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Supreme Court of the United States

OCTOBER TERM, 1943

No. 602

KARP METAL PRODUCTS COMPANY, INC.,

Petitioner,

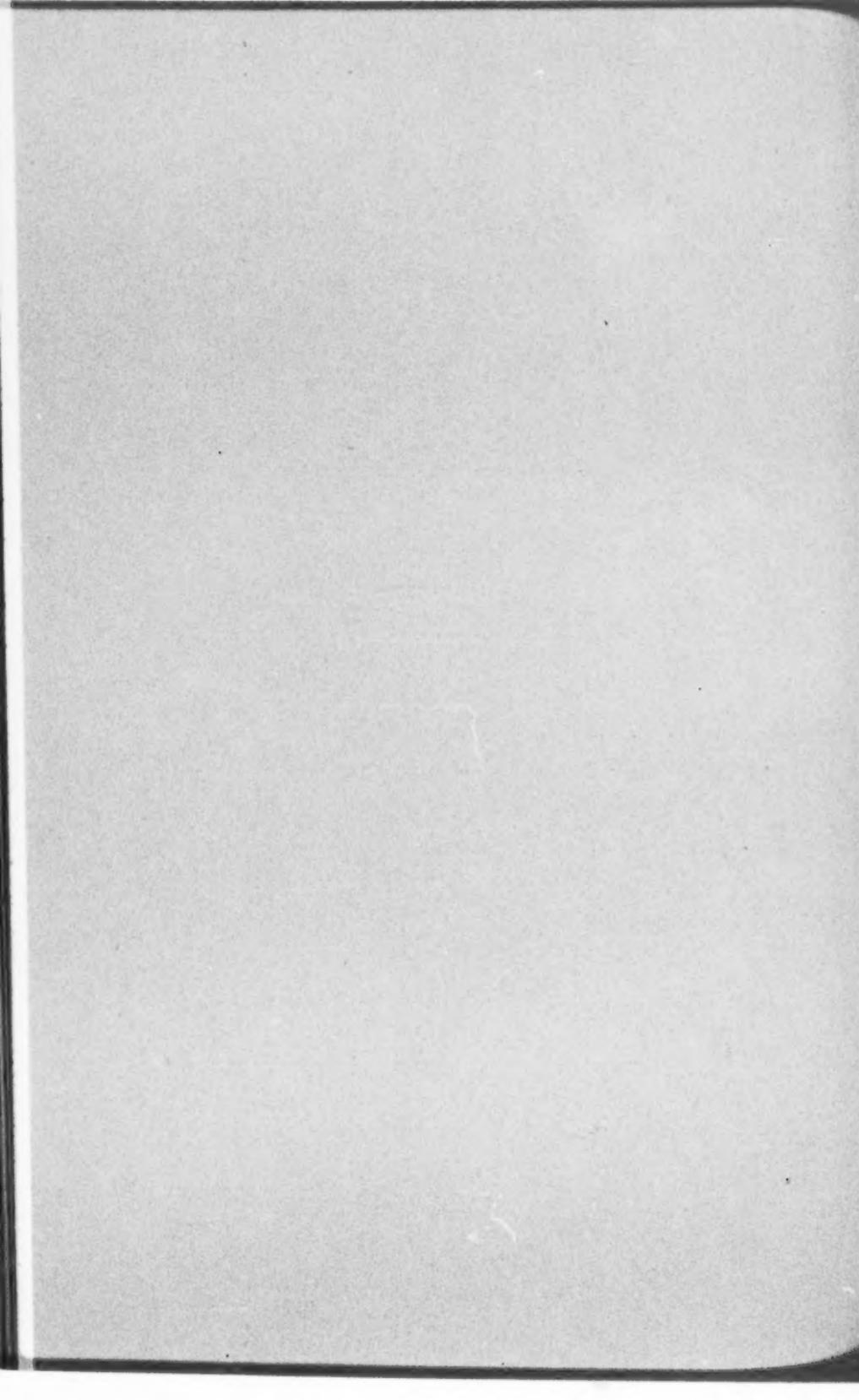
against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
AND BRIEF IN SUPPORT THEREOF**

SAMUEL RUBINTON,
LEONARD ACKER,
Counsel for Petitioner.



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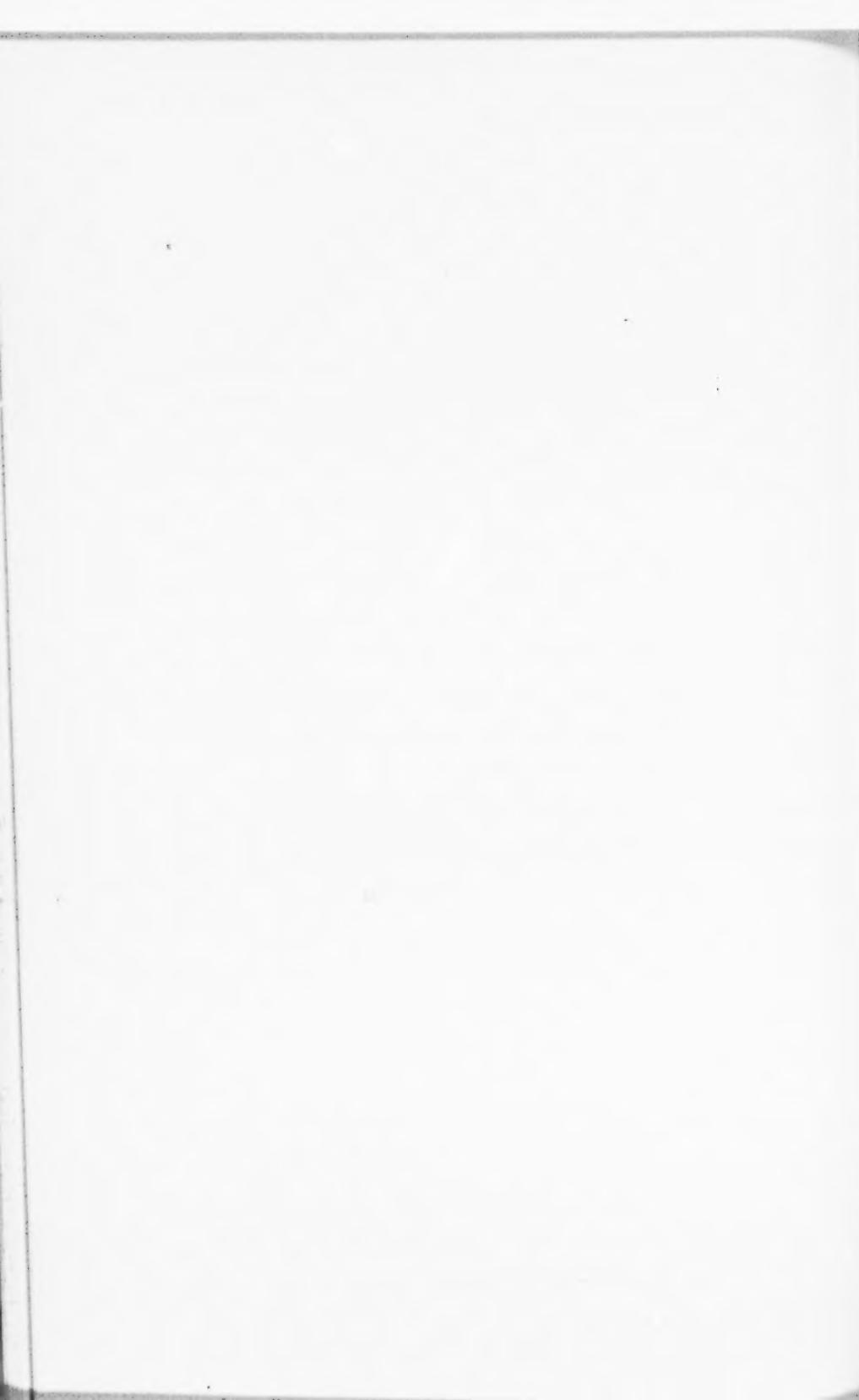
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Supreme Court of the United States

OCTOBER TERM, 1943

No.

KARP METAL PRODUCTS COMPANY, Inc.,
Petitioner,
against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The petition of Karp Metal Products Company, Inc., respectfully shows to this Honorable Court:

Summary Statement of Matter Involved

Petitioner seeks to review, under Judicial Code, Section 240, 28 U. S. C., Section 347, a supplemental decree of the Court of Appeals for the Second Circuit, dated October 23, 1943, enforcing respondent's order requiring petitioner to bargain with Fabricated Metal Local 1225, United Electrical, Radio & Machine Workers of America, C. I. O., herein called Local 1225, as the exclusive representative of petitioner's employees.

Petitioner manufactures sheet metal products in New York City (6532).* Upon charges filed by Local 1225 the Labor Board, on July 10, 1941, issued its complaint charging petitioner with unfair labor practices under Sections

* All references, unless otherwise qualified, are to the folios of the transcript of the record before the Court of Appeals.

2(6), 7 and 8(1) of the National Labor Relations Act (6517).

The complaint, as amended, charges that petitioner, between 1937 and 1941, sponsored and dominated an organization of its employees called the Collective Bargaining Committee or Karp Metal Products Employees Union, referred to herein as the Committee, and that it refused to bargain with Local 1225, which, since about June, 1941, represented a majority of its employees, exclusive of office and clerical workers and salesmen, and committed various acts to discourage membership in that union (5552-5575).

Petitioner's answer was a general denial, as was that of the Committee, which intervened (5499-5506, 5509-5542, footnote to 6525).

Hearings were thereafter had before a Trial Examiner who issued his Intermediate Report on February 11, 1942 (6528). He found petitioner guilty of the charges and recommended that it withdraw recognition from and disestablish the Committee and bargain with Local 1225 (6183-6189).

The Petition to Reopen

On March 18, 1942, and before the Board had ruled upon the Trial Examiner's report, petitioner moved the Board to reopen the hearings and a labor organization known as Karp Employees Union, herein called the new union, moved to intervene and to reopen the hearings (6203-6305). These motions were made so that proof might be presented to show, as set forth in the affidavits upon which the applications were based, that petitioner's employees no longer desired to be represented by the Committee or by Local 1225, but that of their own free choice and uninfluenced in any way by any act of petitioner, they desired to be represented by the new union (6227, 6277, 6283-6290).

Petitioner's application was based on the affidavit of its president (6206), and the affidavits of four of its employees (6254-6303). The application of the new union was based upon the same affidavits of these four employees, three of whom were former members of Local 1225, which affidavits are reprinted at folios 6311 to 6363.

The employees' affidavits set forth:

Petitioner's employees became dissatisfied with Local 1225 as they felt it was not interested in them (6256, 6276, 6282, 6290). Likewise, they did not desire the Committee (6259, 6282).

Following a strike in 1941 the men began talking about forming a new union which should have nothing to do with the Committee or with Local 1225, and three of them, former members of Local 1225, met in a restaurant one night to discuss the idea (6257). They decided to call a meeting to ascertain the men's wishes and one of the three prepared a proposed constitution and by-laws to submit to the meeting (6258, 6259).

The meeting was held on January 8, 1942, in a tavern, and over 100 men attended, there being no supervisory employees present (6259). The meeting was unanimously against the Committee and Local 1225 and in favor of forming their own union (6260). The men elected an organization committee, and after making changes therein adopted the proposed constitution (6260, 6282, 6289, 6294).

The new union thus formed, Karp Employees Union, was conceived and organized without suggestion, help, advice or interference from petitioner, and was not brought about nor hindered by any unfair labor practice of petitioner (6272).*

The new union has as members 145 of petitioner's 158 employees. Of these, 57 formerly were members of Local 1225, 49 formerly were members of the Committee and 39 are new employees (6272, 6274). The new union's members

* These statements, as well as the other facts set forth in the affidavit of Sam Deitsch, are re-alleged by reference in the affidavits of the other three employees (6280, 6289, 6294).

met again in January, 1942, and elected a Board of Directors, officers and a bargaining committee (6262-6265). The meeting formulated demands to be presented to petitioner (6265); the bargaining committee was instructed to present these demands and thereafter so did and negotiated in respect of them and the negotiations terminated in a written contract between petitioner and the new union on behalf of all employees, exclusive of supervisory and clerical workers, salesmen, watchmen, guards and employees of the engineering department (6265-6281). A copy of this contract, which runs for three years and recognizes the new union as the exclusive representative of such employees, appears at folios 6231 to 6250.

The affidavit of petitioner's president refers to the organization of the new union (6210, 6211) and to the discussions between its bargaining committee and him (6218, 6221). Before commencing these discussions, he made inquiries concerning the new union and became convinced that the Committee had been abandoned and that the men no longer wished to be represented by Local 1225 (6219).

Petitioner has not aided the new union, which came into existence without its assistance, knowledge or suggestion (6225); petitioner has not interfered with or dominated the new union nor has it given the new union any financial or other support and it has not restrained or coerced any employee in the exercise of his rights under the National Labor Relations Act, by discrimination in regard to hire, tenure or conditions of employment, nor has it encouraged or discouraged membership in the new union, and it has been innocent of any unfair labor practice in respect of the new union (6226); the organization of which likewise was unaffected by any unfair labor practice (6272).

The development of the new union, its formation and its negotiations with petitioner all occurred after the close of the taking of testimony before the Trial Examiner in this proceeding, and it was therefore impossible to offer proof

thereof before the Trial Examiner (6229). The motions of petitioner and the new union were made so that such proof could be offered (6204, 6277, 6290, 6307).

The Board's Decision

The decision reviews the steps in the proceedings, confirms the Trial Examiner's rulings (6516-6529), and denies the petitions of petitioner and the new union to reopen the proceedings and to intervene (6530).

The Board found petitioner guilty of the unfair practices charged (6532-6621), that petitioner refused to bargain with Local 1225, which after June 3, 1941 represented a majority in the appropriate bargaining unit (6622-6662). The Board ordered petitioner to desist from the unfair practices of which it was found guilty (6669, 6682), to withdraw recognition from the Committee (6686) and to bargain exclusively with Local 1225 (6675, 6684, 6689).

The Board ruled that the allegations in the petition to reopen and to intervene were immaterial as they referred to events subsequent to the acts of which complaint was made (6674).

The Court of Appeals' First Decision and the Subsequent Proceedings

Following its decision, the Board filed the customary petition for enforcement. The Court of Appeals, with opinion, reported at 134 F. (2d) 954, while confirming the Board in other respects, held the Board had erred in refusing to consider the petitions to intervene and to reopen, and in failing to pass upon the question of whether petitioner's earlier unfair practices continued to vitiate its employees' choice of a representative (Supplement to Transcript of Record 135-137).*

* Reference to the folios of the Supplement to Transcript of Record will hereinafter be denoted by the abbreviation "Supp."

The case was remanded to the Board to pass upon the question which the Board was instructed to determine as of the date of the hearing to be held thereon (Supp. 138, 153). The Court deferred enforcement of so much of the Board's order as directed petitioner to bargain with Local 1225 until determination of the remanded question (Supp. 137, 152). Following the Court of Appeals' decision, the Board, on May 17, 1943, issued its order, which after referring to the remanding of the case so that the petitions to intervene and to reopen could be passed upon, recited that the Board had "fully considered the averments of said petitions and having accepted said averments as true" called upon petitioner and the new union to show cause why the petitions should not be denied and the Board's decision reaffirmed (Supp. 9, 10).

The Board's order gave leave to file a verified statement of additional facts (Supp. 11). In response, the new union filed a verified statement by its president (Supp. 19) and petitioner filed a verified statement by its president (Supp. 46).

Petitioner filed a statement objecting to the Board proceeding without holding a hearing upon the petitions as directed by the Court of Appeals (Supp. 54, 55). The Board's order to show cause had recited that the Board accepted the averments of the petitions as true, and petitioner's statement read that if these averments and the verified statements were accepted as true, petitioner would waive the Board passing upon the petitions without a hearing (Supp. 55).

The statement of the new union's president sets forth that the new union originated solely from the dissatisfaction of petitioner's employees with Local 1225 and not by reason of any act of petitioner; that it was conceived and created primarily by former members of Local 1225 and of their own free will (Supp. 22). The statement sets forth that the new union had as members, 139 of the 182 persons then employed in the appropriate unit (Supp. 26), brings

the new union's history down to June 1943, and reviews its activities and demands on behalf of petitioner's employees which it negotiated with petitioner (Supp. 23-42). It further points out the new union's efforts to hold the workers to their own obligations (Supp. 42-44).

The statement of petitioner's president points out that 107 of the employees in the bargaining unit are new hands employed since June 1941 (Supp. 50, 51), which was the date on which the Board found petitioner had refused to bargain with Local 1225, which then represented a majority of the appropriate bargaining unit. The statement further points out that the change in personnel was due solely to normal and natural turnover, the taking of men into the armed forces and increase in total employment (Supp. 50, 51).

The Board's Supplemental Decision

Following the filing of petitioner's statement and of the additional verified statements by petitioner and the new union, the Board, without further proceedings, rendered a supplemental decision which denies the petitions to intervene and to reopen (Supp. 94). It reviews the unfair practices of which the Board previously had found petitioner guilty (Supp. 79-81). The Board ruled that the adherence of the employees to the new union could not be regarded as their untrammeled will, as it was the kind of action taken by employees subjected to such unfair practices (Supp. 78, 81). The Board further ruled that while the affidavits set forth that the new union was not affected by petitioner's prior unfair practices, that nevertheless the effect of such practices could not be disregarded while they remained unremedied (Supp. 84-87); that such unremedied practices must be deemed to have been the cause of the men joining the new union (Supp. 92); and that the freedom of choice given to employees by the statute could only be restored by compelling petitioner to bargain with Local 1225 (Supp. 94).

The Court of Appeals, upon the Board's application and without opinion, confirmed the Board's supplemental decision and ordered petitioner to bargain with Local 1225 as the exclusive representative of its employees.

Petitioner does not now challenge the Board's findings as to the unfair practices of which petitioner was charged or the ruling requiring the Committee to be disestablished and has fully complied with the Board's order in such respects. It attacks only the ruling made upon the remanded issue whereby the Board held the new union must be deemed to have been affected by the prior unfair practices and requiring petitioner to continue to bargain with Local 1225.

Questions Presented and Reasons Relied On For Allowance of the Writ

I

The Board erroneously ordered petitioner to bargain with Local 1225 although it was the undisputed fact that for reasons unrelated to petitioner's unfair practices, Local 1225 no longer represented a majority of the appropriate bargaining unit. The Court of Appeals ruling affirming the decision of the Board presents an interpretation of the National Labor Relations Act contrary to this Court's rulings in *National Labor Relations Board v. Fansteel Metal Corp.*, 306 U. S. 240, and in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197.

II

The ruling that the new union must be deemed affected by the prior unfair practices of petitioner was without substantial proof and contrary to this Court's decisions in *National Labor Relations Board v. Columbian E. & S. Co.*, 306 U. S. 292, and in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197.

III

The Board's decision on the remanded issue disregarded the arrangement made at the Board's instance, whereby petitioner waived its right to a hearing upon the assurance that the averments of the petitions to intervene and to reopen would be accepted as true. The procedure followed by the Board thereby deprives petitioner of its constitutional right to a hearing and is contrary to this Court's decisions in *Morgan v. United States*, 298 U. S. 468, and *Ohio Bell Telephone Co. v. Public Utility Commission*, 301 U. S. 292.

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court to review the supplemental decree of the Court of Appeals for the Second Circuit, of October 23, 1943, requiring petitioner to bargain with Local 1225 as the exclusive representative of petitioner's employees in the appropriate bargaining unit, and that your petitioner have such other and further relief as may seem meet and just, and your petitioner will ever pray.

KARP METAL PRODUCTS COMPANY, INC.
By: SAMUEL RUBINTON
LEONARD ACKER

Supreme Court of the United States

OCTOBER TERM, 1943

No.

KARP METAL PRODUCTS COMPANY, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion of the Court Below

No opinion was written by the Court of Appeals upon the rendition of the supplementary decree sought to be reviewed. An opinion was written when the proceeding was remanded to the Board, which is reported at 134 F. (2d) 954.

Jurisdiction

The supplementary decree sought to be reviewed is dated October 23, 1943. The statutory authority under which jurisdiction is invoked is Judicial Code, Section 240, 28 U. S. C., Section 347.

Statement of the Case

The National Labor Relations Board, upon charges made by Local 1225, found petitioner guilty of unfair labor prac-

ties in having fostered and dominated the Committee and in refusing to bargain with Local 1225. The Board had refused to pass upon a petition to reopen the hearing, filed by petitioner, and a petition to intervene and to reopen the hearing, filed by the new union. These petitions were based upon affidavits showing that the majority of petitioner's employees, for reasons unrelated to petitioner's prior unfair practices and uninfluenced in any way by petitioner, desired to be represented by the new union.

Upon this proceeding brought by the Board to enforce its order, the Court of Appeals remanded the case to the Board with instructions to pass upon the petitions as of the date of a hearing to be held thereon, in accord with its power to remand a case to the Board to permit further evidence to be taken (*Ford Motor Co. v. N. L. R. B.*, 305 U. S. 364), and deferred enforcement of so much of the Board's order as required petitioner to bargain with Local 1225 until the Board so had done. The Board then issued its order to the petitioner and the new union, reciting that the averments of the petitions were accepted as true and that the parties might file additional verified statements, and that they should show cause why the petitions should not be denied.

Petitioner thereupon waived a hearing upon the issues presented by the petitions if the averments thereof and of the additional verified statements being presented were accepted as true, as set forth in the Board's order to show cause. These additional verified statements, like those of the petitions, showed that the new union was not the result of any unfair practice or any other act of petitioner, but was the men's free choice.

The Board thereupon, without holding any hearing, denied the petitions, ordered petitioner to bargain with Local 1225, and its determination was confirmed by the Court of Appeals.

Specification of Errors

The National Labor Relations Board and the Court of Appeals erred in the denial of the petition to reopen the hearing and in directing petitioner to bargain with Local 1225.

Summary of Argument

I

The Board erred in directing petitioner to bargain with Local 1225 since the undisputed proof is that a majority of petitioner's employees, of their free will and for reasons not related to petitioner's unfair practices, desire the new union and not Local 1225 as their representative.

II

The Board's finding that the new union was the result of petitioner's unfair practices, is unsupported by substantial proof.

III

The Board's procedure upon the remanded issue deprived petitioner of its constitutional right to a hearing.

POINT I

It was error to order petitioner to bargain with Local 1225, since it was undisputed that petitioner's employees, of their own free will and unaffected by any unfair practice of petitioner, desired to be represented by the new union.

The National Labor Relations Act is remedial, not penal, and is aimed at encouraging collective bargaining and at protecting the exercise by workers of full freedom of asso-

ciation, of self-organization, and of negotiating terms of their employment, or other mutual aid or protection, through their freely chosen representatvies. *Republic Steel Corp. v. N. L. R. B.*, 311 U. S. 7, 10.

It is the Board's function to safeguard this right of employees and to protect it against interference by the employer. *Republic Steel Corp. v. N. L. R. B.*, 311 U. S. 7, 13.

This right of employees freely to choose their representatives, includes the choice of an independent or local union as against a nationally affiliated organization. *N. L. R. B. v. Riverside Mfg. Co.*, 119 F. (2d) 302; *N. L. R. B. v. Mathieson A. Works*, 114 F. (2d) 796, 802; *N. L. R. B. v. Swank Products*, 108 F. (2d) 872, 874.

This right to choose an independent union includes the privilege to revoke a prior designation of a national union. *N. L. R. B. v. Hollywood-Maxwell Co.*, 126 F. (2d) 815. Employees' preference for an independent union forms no basis for any presumption or inference that such preference was influenced by the employer, and the statute proceeds upon the contrary presumption. *Magnolia Petroleum Co. v. N. L. R. B.*, 112 F. (2d) 545; *Hamilton-Brown Shoe Co. v. N. L. R. R.*, 104 F. (2d) 49.

Thus, in *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, this Court, while ruling that in the case before it there was substantial proof to show that the independent union which the employees had chosen was employer-dominated and, therefore, not the free choice of the men, was careful to point out that "an 'inside' union, as well as an 'outside' union may be the product of the right of the employees to self-organization and to collective bargaining 'through representatives of their own choosing'." The question, the Court pointed out, was whether "the Board was justified in concluding that the independent union was not the result of the employees' free choice because the employer had intruded to impair their freedom" (p. 587).

Here, as will be pointed out, there was nothing to show the men's choice of the new union was influenced by the

employer and the uncontradicted proof and accepted fact is that no act of petitioner in any way affected the men's choice of the new union.

It furthermore has been held by various Courts of Appeals that when the employees' choice of a local union has been influenced by improper practices of an employer, so that the selection must be disregarded as not being the free choice of the men, that, nevertheless, when subsequently the employees choose another local union to represent them, and the proof is that such subsequent choice is not influenced by the prior unfair practices of the employer, that then the men's choice must be respected and the local union treated as their representative. These cases rule that the domination by an employer of one local union does not justify an inference that the choice of a subsequent local union is thereby affected when the proof is to the contrary. *Magnolia Petroleum Co. v. N. L. R. B.*, 112 F. (2d) 545; *E. I. Dupont de Nemours Co. v. N. L. R. B.*, 116 F. (2d) 388, certiorari denied 313 U. S. 571; *N. L. R. B. v. Standard Oil Co.*, 124 F. (2d) 895; *Oughton v. N. L. R. B.*, 118 F. (2d) 486.

Thus, it is held that though the employer has improperly interfered with the organization of an employees' union, the men may thereafter, if they act freely and of their own choice and unaffected by the employer's acts, reorganize themselves under the same constitution and with the same persons to lead them. *Humble Oil & Refining Co. v. N. L. R. B.*, 113 F. (2d) 85.

In *A. E. Staley Mfg. Co. v. N. L. R. B.*, 117 F. (2d) 868, it was ruled that a presumption that a local union is dominated by the employer because it is a successor to local unions which were so dominated, may not be indulged in by the Board when the uncontradicted proof is to the contrary.

These cases are in accord with the principle enunciated by this Court in *N. L. R. B. v. Fansteel Metal Corp.*, 306 U. S. 240, that when a union which once was the choice of a majority of a company's employees, no longer is the

choice of the majority for reasons other than the employer's unfair practices, the Board may not properly order the employer to bargain with such union.

In like manner, this Court ruled, in *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332, 344:

"As the respondent had lawfully secured others to fill the places of the former employees and recognized a new union, which so far as appears, represented a majority of its employees, the old union and its shop committee were no longer in a position on September 4th to demand collective bargaining on behalf of the company's employees."

See also, *Hamilton-Brown Shoe Co. v. N. L. R. B.*, 104 F. (2d) 49.

Upon the same principle, on which rest the cases holding that employees' free choice of a local union must be upheld where there is nothing to show that the prior unfair practices of an employer has influenced that choice, this Court, in *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 236, ruled that the Board was without power to order an employer to cease giving effect to contracts with a local union when "there is no basis for a finding that the contracts * * * were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective".

That the new union was unaffected by the prior unfair practices of petitioner, is here the accepted fact

The Court of Appeals remanded the proceeding for a hearing on the issue of whether petitioner's employees, of their free choice, desired the new union to represent them. On this issue, which is the only issue now in dispute, petitioner waived a hearing in accord with the arrangement

made at the Board's instance that the averments of the petitions to reopen and to intervene were accepted as true (Supp. 10).

These petitions, as has been pointed out, show that the new union was the result of the employees' dissatisfaction with Local 1225 which they had come to believe was no longer interested in them (6256, 6282, 6290); that it was organized at the initiative of the men themselves (6257-6260, 6282); and conceived and formed without suggestion, help, advice or interference from petitioner (6272); that petitioner has in no way aided the new union which came into being without its knowledge and has in no manner interfered with or dominated or either encouraged or discouraged membership therein (6226); and that the men's choice of the new union was their own free choice, uninfluenced in any way by any practice or act of petitioner (6227, 6272, 6276).

It follows that the Board was without power to order petitioner to continue to bargain with Local 1225, for the employees, of their own free choice, no longer desired Local 1225 as their representative and had chosen the new union as their agent.

The Board proceeded on the assumption that once an employer has refused to bargain with a national union which represents a majority of his employees and has fostered an independent union, that it must be deemed, as a matter of law, and even though the facts show exactly the contrary, that such unfair practices necessarily affect any other independent union subsequent in time, so that the employer must be required to bargain with the national union though it no longer is the choice of the employees, in order to undo the effects of the prior unfair practices (Supp. 81, 88, 92, 94).

The difficulty with the Board's reasoning is that it ignores that it is the accepted fact that the new union was the free choice of the men, unaffected by any act of petitioner, so that there was no effect of any unfair practice to be undone.

The rule, as pointed out, is exactly to the contrary, and when, as here, the proof is that the subsequent union has not been the result of the unfair practices, the men's choice of the subsequent union must be respected and given effect. Here, the uncontradicted fact is that the new union arose solely because of the men's dissatisfaction with Local 1225 and was not affected in any way by unfair practices of the petitioner, for such facts, under the arrangement made pursuant to the Board's order to show cause, were accepted as true.

Cases Relied Upon by the Board

The Board relied upon decisions such as *N. L. R. B. v. Bradford Dyeing Association*, 310 U. S. 318 (Supp. 87). This case represents a line of authority holding that when the unfair practice of an employer, in refusing to bargain with a national union and in fostering a local union, causes his employees to leave the national and to join the local union, that the Board properly may rule that the national union must continue to be treated as the men's representative. The same result was reached by this Court in *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, to which reference already has been made.

These cases are inapplicable, for the proof here is exactly to the contrary, since it is the accepted fact that petitioner's employees left Local 1225 because of their dissatisfaction with it, and, uninfluenced by any act of petitioner, organized their new union. Hence, there was no room for any inference that the new union was the result of any act of petitioner, and the Board could not speculate, as it did, that such was the case.

Thus, for example, in *N. L. R. B. v. Remington-Rand, Inc.*, 94 F. (2d) 862, cited by the Board (Supp. 85), the Court, in disagreeing with the ruling of the Board that a certain union had resulted from the employer's unfair labor practices, ruled:

"While, therefore, it is possible, and perhaps likely, that respondent had a hand in the creation of this union, the conclusion is too speculative" (p. 867).

N. L. R. B. v. Clinton E. Hobbs Co., 132 F. (2d) 249, cited by the Board (Supp. 95), rules merely that when the Board's order is proper upon the record presented, the Board need not prove, as a condition to securing a decree of enforcement, that the employer has disobeyed the order and, further, that because only a minority of those in a bargaining unit who selected a union as their representative remain in the company's employ, is no reason for denying enforcement of an order requiring the employer to bargain with the union. The case is not pertinent to the issue herein, which is whether petitioner's employees, of their free will, selected the new union as their agent.

N. L. R. B. v. Brown Paper Mill Co., 108 F. (2d) 867, cited by the Board (Supp. 96), rules only that when the proof establishes that the employer has had a hand in organizing, supporting, interfering or collaborating with a labor organization, it may not be recognized as the free and voluntary association called for by the statute.

The Board cites *Oughton v. N. L. R. B.*, 118 F. (2d) 486 (Supp. 95). The decision, while it recognizes the general rule that an employer may not attack the status of a union which represented a majority of his employees and whose majority was dissipated by his unfair practices, sustains petitioner. A complaint was filed against the employer for unfair practices in respect of a national union which had a majority of the employer's men as members. At the hearing, a petition to intervene was filed by a local union which alleged that it presently represented 75% of the employees. The Board declined to consider the petition. This was held error as the Board was bound to pass upon the petition to determine whether the local union was the free choice of the employees, since it was not proper to require the employer to bargain with the national union if it no longer represented a majority.

The Board also refers to cases such as *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72; *N. L. R. B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *N. L. R. B. v. Pacific Greyhound Lines*, 303 U. S. 272; *Texas & N. O. R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548 (Supp. 84, 87).

These are cases where the proof showed that an employer favored one labor organization as against another and they hold that such proof is sufficient to show that the employees' freedom of choice is thereby affected. They further hold that when an employer wrongfully refuses to bargain with the union which is his men's chosen representative, that such refusal affects his men's choosing of an agent, and that the employer may be required to bargain with such union.

Similar results were reached in *N. L. R. B. v. Lorillard Co.*, 314 U. S. 512, and *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350.

These cases are not pertinent, for here it is the accepted fact that the new union was unaffected by any conduct of the petitioner and that petitioner has neither favored nor been opposed to it. It may not be inferred, as did the Board, that the prior unfair practices of which petitioner was found guilty affected the men's choice of the new union, for under the procedure adopted by the Board on the remanded issue, it became what was tantamount to a stipulated fact that the new union came into being for reasons entirely dissociated with the prior unfair labor practices of the petitioner and that no act of the petitioner, prior to or during its existence, in any way affected the men's choice of the new union.

The Board, in effect, ruled that irrespective of the facts, it could hold as matter of law that the petitioner must continue to bargain with Local 1225, since it once had improperly refused to bargain with it. There is no basis for such ruling for, as pointed out, when employees choose a local union as their representative, unaffected by any act

of their employer, such choice must be respected, though the employer previously has wrongfully favored another local union as against a national union.

Thus, in *N. L. R. B. v. Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50, 57, Adv. Sheets No. 1, where it was ruled that when an association of employees had been company dominated prior to the passage of the statute and was merely reorganized and not disestablished thereafter, that such continuity was a fact from which the Board could infer that the effects of the domination continued, the Court carefully pointed out that such continuity did not establish employer domination "as a matter of law".

The Board reasoned that it would effectuate the policies of the Act to require petitioner to bargain with Local 1225 (Supp. 94). Quite to the contrary, the decision frustrates the policies of the Act. The purpose of the statute, as noted, is remedial and to secure to workers their right of collective bargaining through agents of their free choice. The decision ignores that petitioner's employees, dissatisfied with Local 1225, desire to bargain through their new union, and prohibits the men from bargaining through the agent they have freely chosen and punishes the men and petitioner alike by compelling them to bargain through an agent the men no longer desire.

POINT II

The supplemental decision is without substantial proof to support its findings.

It is settled that there must be substantial proof to sustain the findings of the Board. *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229; *N. L. R. B. v. Columbian Enamelling & Stamping Co.*, 306 U. S. 292, 300.

Such substantial proof "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *Consolidated Edison Co. v. N. L. R. B.*, 305

U. S. 197, 229. It must be "more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established". *N. L. R. B. v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300.

Whether there is such sufficient proof to sustain the Board's findings presents a question of law. *Washington, Virginia & Maryland Coach Co. v. N. L. R. B.*, 301 U. S. 142, 146, 147; *N. L. R. B. v. Boss Mfg. Co.*, 107 F. (2d) 574.

The issue remanded herein was whether the new union was the free choice of the men, unaffected by petitioner's unfair practices. The Board ruled the unfair practices of which it had found petitioner guilty must be deemed to have impelled the employees to join the new union (Supp. 78, 85, 86, 93) and that to remedy the effects of such practices so as to restore the men's freedom of choice, petitioner must be required to bargain with Local 1225 (Supp. 89, 95).

The Board's findings and decision have no proof, substantial or otherwise, in their support, for, as has been noted, upon the remanded issue the proof, accepted as the fact under the procedure adopted by the Board, was all to the effect that the new union was the free choice of petitioner's employees, brought about solely through their dissatisfaction with Local 1225 and unaffected and uninfluenced in any way by any act of petitioner.

Because the Board in some cases rightly has inferred that acts of an employer in fostering some local union and displaying hostility to a national union has affected his men's subsequent choice of another local union, is of no consequence herein. Each case necessarily must stand on its own facts, and as pointed out, the cases hold that when such choice of a subsequent union is not affected by the prior practices of the employer, such choice then must be sustained.

POINT III

The Board's method of determining the remanded issue deprived petitioner of its constitutional right to a hearing.

The procedure adopted by the Board is subject to the requirements of due process. *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 362. Petitioner therefore was entitled to "a fair and open hearing" for "the right to such a hearing is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement". *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 304, 305.

This rule applies to proceedings before the National Labor Relations Board. *N. L. R. B. v. Newberry Lumber & Chem. Co.*, 123 F. (2d) 831, 838; *N. L. R. B. v. Prettyman*, 117 F. (2d) 786, 790.

Under the procedure adopted by the Board, petitioner waived the customary hearing at which testimony is taken in open forum, upon the assurance of the Board that the averments of the petitions would be accepted as true by the Board in determining the remanded issue. This was not a waiver by petitioner of its constitutional right to be heard upon the facts, for the petitions showed that the new union was the free choice of the employees, unaffected by any act of petitioner, and thus showed all that petitioner could have proved in open court, so that it was giving up nothing.

Petitioner's objection is not to the form of procedure adopted by the Board as such, if the Board had carried out the assurance contained in its order to show cause. The difficulty is that after petitioner, in reliance upon that assurance, waived its right to the customary hearing, the Board, in making its decision, disregarded the assurance it had given and thus effectively deprived petitioner of a hearing upon the facts. Petitioner waived its right to an

open hearing upon the assurance that the Board, in deciding the remanded issue, would take it as true that the new union was formed by the employees of their own free choice and by reason of their dissatisfaction with Local 1225 and that the employees, in making their choice, had been uninfluenced and unaffected by any act of petitioner. Such were the averments of the petitions which the Board's order to show cause had stated would be taken as true.

The decision, ignoring the assurance that the Board had given and ignoring the averments of the petitions, finds that the new union can not be deemed the men's free choice but must be held to have been influenced and affected by the unfair practices of which the Board found petitioner had been guilty, and that it was necessary to remedy these practices before the men could have freedom of choice. The Board therefore ordered petitioner to bargain with Local 1225, disregarding its assurance that in making its decision it would assume to be true various averments which show definitely that the employees, of their free choice and uninfluenced in any way by any act of petitioner, no longer desired Local 1225 as their bargaining agent but wished to bargain through the new union. The Board thereby decided the remanded issue not upon the basis of the facts which were before it and which, under the arrangement made at the Board's instance, were to be taken as true by the Board, but upon the basis of a general hypothesis that whenever an employer favors a local as against a national union, it necessarily follows that any subsequent choice by the employees of another local union is affected by the prior acts of the employer.

The Board in making its decision was thus guided not by the facts of the case, but by a concept probably derived from other controversies and inapplicable herein by reason of the facts which the Board had agreed were to be taken as true. Such method of procedure whereby the Board repudiated its assurance that the averments of the petitions were to be taken as true, upon the basis of which

assurance petitioner waived its right to the customary hearing, deprived petitioner of its right to a hearing upon the facts.

As this Court ruled in *Morgan v. United States*, 298 U. S. 468, 480, in passing upon the necessity of a quasi-judicial administrative board, such as the Board herein, actually to consider the evidence presented upon a controversy where the taking of evidence has been delegated to a subordinate, "the requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action."

This doctrine applies to the National Labor Relations Board. *N. L. R. B. v. Baldwin Locomotive Works*, 128 F. (2d) 39, 62.

The effect of an administrative tribunal making its decision upon some basis other than the evidence presented, as was done herein by the Board, is especially serious when, as is the case with the National Labor Relations Act, there is no method of review by separate or independent suit but where the reviewing court considers the case both as to law and facts, upon the record made before the Board. *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 303.

CONCLUSION

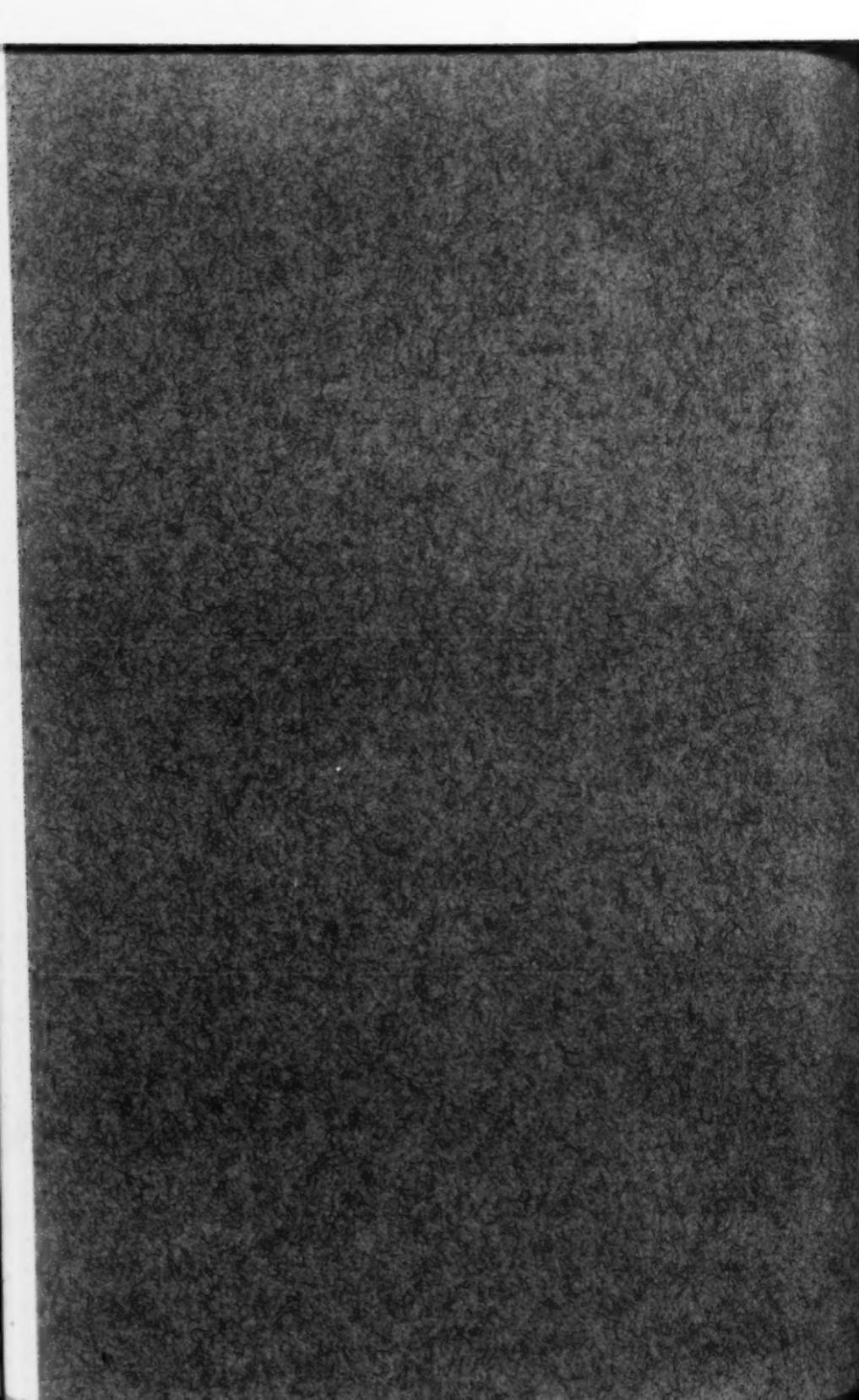
**It is respectfully submitted that the writ of certiorari
prayed for should be granted.**

Respectfully submitted,

SAMUEL RUBINTON,
LEONARD ACKER,
Counsel for Petitioner.



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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 602

KARP METAL PRODUCTS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT*

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS
BOARD

OPINIONS BELOW

The opinion of the court below (R. 2294-2296) is reported in 134 F. (2d) 954. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 2172-2231) are reported in 42 N. L. R. B. 119. The supplemental findings of fact and recommendation of the National Labor Relations Board to the court below (R. 2273-2283) are reported in 51 N. L. R. B. 621.

JURISDICTION

The first decree of the court below (R. 2298-2302) was entered on April 21, 1943. A supplemental decree was entered on October 23, 1943 (R. 2303-2305). The petition for a writ of certiorari was filed on January 12, 1944. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

The primary question presented is whether the Board, having found that petitioner had interfered with the self-organization of its employees and refused to bargain collectively with a labor organization designated by a majority of the employees in an appropriate unit, may properly order petitioner to bargain with that labor organization, although prior to the issuance of the Board's order a sufficient number of the employees who had designated that labor organization had left the petitioner's employ so that the labor organization was no longer designated by a majority of the employees in the unit.

STATUTE INVOLVED

The statute involved is the National Labor Relations Act, 49 Stat 449, 29 U. S. C. 151 *et seq.*

STATEMENT

Upon the usual proceedings the Board issued its findings of fact, conclusions of law, and order (R. 2172-2231). The pertinent facts, as found by the Board and shown by the evidence, may be summarized briefly as follows:

In January and February 1937, petitioner, by refusing to deal with a nationally affiliated union which then represented a majority of its employees, by announcing it would never enter into a written contract with any union, and by coercing its employees to abandon a strike called to secure the recognition to which their representative was entitled, completely disrupted its employees' efforts to obtain collective bargaining (R. 2179-2186). In February 1937, petitioner coerced its employees into signing individual, 5-year contracts of employment, the terms of which infringe rights guaranteed employees by the Act (R. 2184-2187, 2189-2191). In March 1937, petitioner instigated the formation of the Employees Union, which it thereafter dominated and supported (R. 2188-2189, 2203-2207).

In 1940 and 1941, when petitioner's employees began to join the United,¹ petitioner utilized the Employees Union as a bulwark against their attempts to establish the United as their collective bargaining agent, tried to prevent the holding of

¹ United Electrical, Radio & Machine Workers of America, C. I. O.

United meetings, threatened employees who joined the United with physical violence, and interfered in other ways with their exercise of rights under the Act (R. 2191-2207).

By June 3, 1941, however, 98 out of 172 of petitioner's production and maintenance employees had designated the United as their bargaining agent (R. 2208-2213). Petitioner has at all times steadfastly refused to recognize the United or to deal with it upon request, and, both before and after June 3, 1941, engaged in numerous anti-union activities designed to destroy the United (R. 2195-2203, 2213-2223).

On March 18, 1942, prior to the issuance of the Board's decision, but subsequent to the hearing before the Trial Examiner, petitioner and Karp Employees Union each filed petitions with the Board in which they asked the Board to reopen the record for the purpose of showing that a majority of petitioner's employees were then members of the Karp Employees Union (R. 2274). The Board denied these petitions on the ground that the new facts alleged, "even if true, are subsequent to and in no way affect the acts complained of or the legal conclusion to be drawn therefrom" (R. 2177, 2225).

Upon the foregoing facts the Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (5) of the Act, and entered an order requir-

ing petitioner to cease and desist from its violations of the Act, to cease giving effect to the individual contracts, to disestablish the Employees Union, to bargain collectively with the United, and to post appropriate notices (R. 2226-2231).

On October 26, 1942, the Board filed a petition in the court below seeking enforcement of its order, and on March 25, 1943, the court handed down its opinion sustaining the Board's order except the provision requiring petitioner to bargain collectively with the United, which the court declined to enforce until the Board passed on petitioner's and Karp Employees Union's proffered evidence and determined whether the United still represented a majority of the employees in the appropriate unit, and whether petitioner's unfair labor practices continued to vitiate any new choice of a collective bargaining representative (R. 2294-2296). On April 21, 1943, the court entered a decree enforcing the Board's order except the bargaining provisions and remanding the cause to the Board for the purpose of the Board's passing on the matters indicated in the court's opinion (R. 2298-2302).

Acting pursuant to the remand, the Board on May 17, 1943, issued an order directed to petitioner and to the Karp Employees Union, requiring them to show cause why the Board should not order petitioner to bargain with the United (R. 2253-2254). In response thereto, petitioner sub-

mitted a written statement of its position together with a supporting affidavit of its president and waived its right to a further hearing if the averments in the affidavits filed with the Board were accepted by the Board as true (R. 2266-2271). The Karp Employees Union also submitted an affidavit of its president in support of its position (R. 2257-2265).

On July 22, 1943, the Board, upon the basis of the documents filed in response to its show cause order and upon the entire record in the case, issued its supplemental findings of fact and recommendations (R. 2273-2283). The Board accepted as true petitioner's verified statement that of the 182 employees now within the appropriate unit only 75 were in petitioner's employ on the date of the refusal to bargain and 139 are members of the Karp Employees Union (R. 2276-2281). The Board found, however, that petitioner had never taken any steps to remedy the flagrant unfair labor practices in which it engaged from 1937 to 1941 (R. 2277), that these unremedied unfair labor practices have deterred employees from organizational activity in behalf of the United, have discouraged new employees from becoming members, have caused members to drop from its ranks and have impelled both old and new employees to join the Karp Employees Union as the only alternative to foregoing concerted activity altogether (R. 2281-2282). The Board

further found that conditions permitting freedom of choice have not been restored and that such freedom cannot be restored unless the employees are assured that the Act carries sufficient force to compel petitioner to bargain with their freely chosen representative (R. 2282). The Board, therefore, concluded that it would effectuate the policies of the Act to require petitioner to bargain collectively with the United (R. 2282).

Upon these supplemental findings the Board recommended to the court below that the collective bargaining provisions of the Board's order be enforced (R. 2283). The court below accepted the Board's recommendation and, on October 23, 1943, enforced these provisions of the Board's order without opinion (R. 2303-2305).

ARGUMENT

The Board believes that the court below correctly enforced the collective bargaining provisions of the Board's order, which are the only provisions challenged by petitioner. The determination by the Board that it would best effectuate the policies of the Act to require petitioner to bargain with the United, despite the change of personnel in the unit, was a proper exercise of discretion by the Board within principles laid down by this Court. *National Labor Relations Board v. P. Lorillard Co.*, 314 U. S. 512; *International Ass'n of Machinists v. National Labor Relations Board*, 311 U. S. 72; *National*

Labor Relations Board v. Bradford Dyeing Assn., 310 U. S. 318. However, since the primary question here is substantially the same as that presented in *Franks Bros. Company v. National Labor Relations Board*, No. 521, this Term, certiorari granted January 10, 1944, we do not oppose the granting of the writ.

Respectfully submitted.

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FEBRUARY 1944.

